In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1045

JOSEPH B. SHEPPARD, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners are the administrators of the estates of three Marines who were killed while on active service in the crash of the Air Force airplane which was transporting them from El Toro Marine Corps Air Station, California, to Viet-Nam. Petitioners filed these suits under the Federal Tort Claims Act, alleging that the crash was caused by the negligence of members of the Air Force and other government employees. Relying on *Feres* v. *United States,* 340 U.S. 135, the district court dismissed the complaint (Pet. App. 16). The court of appeals affirmed, for the same reason, in a brief *per curiam* opinion (Pet. App. 17).

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The decision below is clearly correct in applying the rule of the *Feres* case. This Court squarely held there (340 U.S. at 146):

> [T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.

Since it is undisputed that the deceased Marines were killed "in the course of activity incident to service"—while flying in a military aircraft pursuant to orders issued by their military superiors—the decision in *Feres* plainly required dismissal of the complaint. The holding in *Feres,* contrary to petitioners' suggestion, has not been modified. Indeed, it was explicitly reaffirmed in *United States* v. *Brown,* 348 U.S. 110, 113, where the Court declared:

> We adhere * * * to the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty.

Nor does the decision below conflict with the decision of any other court of appeals. Other courts of appeals—like the court below—have been regularly applying the *Feres* ruling to service-incident deaths and injuries. See, *e.g., Preferred Insurance Co.* v. *United States,* 222 F. 2d 942 (C.A. 9) (where the court of appeals noted that the *Feres* rule, and subsequent congressional acquiescence in its holding, dispels any doubt as to the congressional purpose to exclude such claims from the Tort Claims Act), certiorari denied, 350 U.S. 837; *Archer* v. *United States,*

217 F. 2d 548 (C.A. 9), certiorari denied, 348 U.S. 953; *Buer* v. *United States,* 241 F. 2d 3 (C.A. 7), certiorari denied, 353 U.S. 974; *Norris* v. *United States,* 229 F. 2d 439 (C.A. 2); *Zoula* v. *United States,* 217 F. 2d 81 (C.A. 5). All of these cases reflect the settled principle that the compensation provided by the administrative system of military and veterans' benefits is the exclusive remedy for service-connected claims arising out of an activity incident to military service. Only three months ago, this Court noted that comparable administrative systems must be viewed as precluding tort actions and that a "series of comparatively recent cases in this Court has recognized this historic truth and ruled accordingly." *United States* v. *Demko,* 385 U.S. 149, 151.

Since the decision below correctly applies this Court's settled decisions and is not in conflict with the decisions of any other court of appeals,[1] the petition for a writ of certiorari should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

MARCH 1967.

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[1] The decisions in *Indian Towing Co.* v. *United States,* 350 U.S. 61, *Rayonier* v. *United States,* 352 U.S. 315, and *United States* v. *Muniz,* 374 U.S. 150, relied on by petitioners (Pet. 4), are inapposite. Those were all suits by civilians. Petitioners can obtain little comfort from *Lee* v. *United States,* C.D. Calif., No. 66-1052-WPG, decided February 15, 1967 (Pet. App. 18). The district judge there stands alone in refusing to follow *Feres*; the government's application under 28 U.S.C. 1292(b) for leave to take an interlocutory appeal from that decision is pending before the Ninth Circuit.

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